APPENDIX

APPENDIX A.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 804—SEPTEMBER TERM, 1971

(Argued May 15, 1972 Decided June 13, 1972)

Docket No. 72-1146

UNITED STATES OF AMERICA, *Appellee*,

v.

DAVID HANDEL, *Appellant*.

Before: MOORE, SMITH and HAYS, *Circuit Judges*.

Appeal from conviction and sentence on trial to the jury in the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge*, for conspiracy to defraud the United States by causing preparation and filing of false information returns, in violation of 18 U.S.C. §§ 371 and 2, 26 U.S.C. § 7206(2). Affirmed.

J. H. TOPKIS, New York, N.Y. (Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y.) *for Appellant*.

PETER L. TRUEBNER, Asst. U.S. Attorney (Whitney North Seymour Jr., U.S. Attorney for the Southern District of New York, Maurice M. McDermott and John W. Nields, Jr., Asst. U.S. Attorneys, of counsel), *for Appellee*.

SMITH, *Circuit Judge*:

David Handel, former horse owner and racetrack bettor, appeals from a judgment of conviction entered on December 14, 1971 after trial to a jury in the United States District Court for the Southern District of New York, Inzer B.

Wyatt, *Judge.* Appellant was found guilty of conspiracy (18 U.S.C. § 371) to defraud the United States in the ascertainment and collection of revenue information by causing the preparation and filing of false United States Information Returns (Form 1099) (26 U.S.C. § 7206(2) and 18 U.S.C. § 2). He was acquitted on the only substantive count which went to the jury, charging that on April 7, 1965 he had caused the preparation and filing of a Form 1099 which fraudulently concealed the name of the true owner of a winning pari-mutuel twin double ticket at Yonkers Raceway.[1] Sentenced to one year imprisonment, appellant is presently enlarged on bail pending the outcome of this appeal. We find no error and affirm his conviction.

The indictment alleged appellant's participation in a scheme operative during 1964 and 1965 at Yonkers and Roosevelt Raceways whereby he would procure after the first two races of the twin double were run potentially winning tickets at a discount, and, working through a middleman, often one Elvin, a co-defendant who pled guilty to the conspiracy count and testified for the government, have the winning tickets cashed by various other individuals "cashers"); the winnings would then be reported to the Internal Revenue Service on the required Form 1099, filed by the racetrack, as income to the cashers rather than to the actual recipients of those winnings. Four of the seven cashers who were named in the conspiracy count also testified for the government.

Appellant's principal reliance is on his contention that his pre-trial motion to dismiss the indictment for violation of his Sixth Amendment right to a speedy trial was wrongfully denied when thirty months had elapsed between his arrest and indictment, and an additional thirty-four months were to pass before the date set for trial.

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[1] The government offered no proof on five other substantive counts, which were dismissed by the court.

The speedy trial provision of the Sixth Amendment applies only after a formal indictment or information has issued, or after the imposition of the "actual restraints" of an "arrest and holding." *United States* v. *Marion*, 404 U.S. 307, 320 (1971). Inasmuch as the government acceded to appellant's request to dismiss the complaint on which he was arrested in 1966 in order to avoid causing him any economic hardship pending presentation of his case to the grand jury,[2] appellant may not rely on pre-indictment delay in asserting his Sixth Amendment claim. Absent a showing of actual prejudice violative of the Due Process Clause of the Fifth Amendment, appellant is dependent on the safeguard of the applicable statute of limitations, not exceeded here,[3] to protect against any possible prejudice from pre-indictment delay.[4]

The basic elements of a sound speedy trial claim based on post-indictment delay set forth in *United States ex rel. Solomon* v. *Mancusi*, 412 F.2d 88, 90 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969) are not present here. We are con-

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[2] The existance of outstanding criminal charges against him had apparently led to appellant's suspension by the New York State Harness Commission. When the government moved to dismiss the complaint, one of the principal threats against which the speedy trial requirement is intended to protect the accused, that of economic hardship, was eliminated. Of the remaining dangers commonly said to be safeguarded by the Sixth Amendment, appellant suffered from one only, anxiety at the knowledge he was the target of a criminal investigation. See *United States* v. *Marion*, 484 U.S. 307 at 320. In *Marion*, where the defendants had been exposed in the newspapers as the object of a purported criminal investigation three years before their indictment, anxiety or concern without a standing formal accusation was not deemed enough to invoke the Sixth Amendment.

[3] 18 U.S.C. § 3282 (5 years).

[4] The reach of Rule 48(b) of the Federal Rules of Criminal Procedure, also relied on by appellant is identically circumscribed. *United States* v. *Marion*, 404 U.S. at 319.

fronted immediately by appellant's failure to demand a trial. Without compelling countervailing considerations, prior to July 5, 1971, when new circuit speedy trial rules became effective, we have consistently viewed such a failure as a waiver of the right to a speedy trial. *See, e.g., United States* v. *Binder*, 453 F.2d 805, 809 and n.5 (2d Cir. 1971); *United States* v. *Smalls*, 436 F.2d 711, 714 (2d Cir.), *cert. denied*, 403 U.S. 463 (1972); *United States* v. *Aberson*, 419 F.2d 820, 821 (2d Cir. 1970); *United States* v. *Maxwell*, 363 F.2d 437, 441 (2d Cir. 1967), *cert. denied sub nom. Aiken* v. *United States*, 389 U.S. 1043 (1968); *United States* v. *Lustman*, 258 F.2d 475, 478 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958). Although the government's unexplained twenty-eight month delay in preparing for trial[5] might in some circumstances be unreasonable, there is no suggestion here that the delay was deliberately oppressive. *See United States* v. *Dooling*, 406 F.2d 192, 196 (2d Cir.), *cert. denied sub nom. Persico* v. *United States*, 395 U.S. 911 (1969). The crucial element of appellant's claim is alleged prejudice resulting from the death of a potential witness during the period of post-indictment delay. We are entirely unpersuaded that there is any demonstrable prejudice here requiring us to overlook appellant's failure to demand a trial. Had the witness been available, appellant insists, he would have testified that despite their frequent association at the racetrack he had never seen appellant deal with any of the alleged cashers. Even accepting appellant's prediction as wholly accurate, the lost purely negative testimony would clearly not have exonerated him. At best what the witness had failed to see, claimed to be inconsistent with the testimony of five government witnesses, might have affected their credibility. Such a minimal showing of possible preju-

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[5] Although appellant complains of a longer delay, the government announced in February, 1971 that it would be ready to proceed to trial any time after April 1st, subject to 20 days notice; the October trial date was fixed without objection by appellant.

dice will not suffice to overcome appellant's waiver of his right to a speedy trial.

The argument that because appellant was acquitted on the substantive count of the indictment, which had involved the preparation of a false Form 1099 on April 7, 1965, the government as a matter of law cannot have proved the commission of the only overt act put to the jury to support the conspiracy count, namely that appellant went to the raceway on the night of April 7, 1965, borders on the frivolous. The real objection seems to be to the alleged inconsistency of the verdict, but that is no ground for reversal. *United States* v. *Carbone,* 378 F.2d 420 (2d Cir.), *cert. denied,* 389 U.S. 914 (1967).

Lastly, while conceding that the government could properly bring out on direct examination of Elvin that he had been convicted of perjury, appellant contends that it was unfair to elicit the circumstances of the perjury, namely that he had lied to the grand jury about his relationship with appellant. Appellant, however, demonstrated on cross-examination that Elvin's perjury might well have been unrelated to appellant; moreover appellant clearly relied on the perjury conviction to discredit Elvin. In any case review is foreclosed by appellant's failure to make any proper objection below. *United States* v. *Indiviglio,* 352 F.2d 276 (2d Cir. 1965), *cert. denied,* 383 U.S. 907 (1966).

The judgment is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of June one thousand nine hundred and seventy-two.

Present: HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

DAVID HANDEL and ROBERT ELVIN, *Defendants,*
DAVID HANDEL, *Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that orders and judgment of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX C

72-1146

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

DAVID HANDEL and ROBERT ELVIN, *Defendants,*
DAVID HANDEL, *Defendant-Appellant.*

A petition for a rehearing having been filed herein by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is

DENIED

July 28, 1972

DENIED

/s/ LEONARD P. MOORE
Leonard P. Moore

/s/ J. JOSEPH SMITH
J. Joseph Smith

/s/ PAUL R. HAYS
Paul R. Hays

72-1146

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

DAVID HANDEL and ROBERT ELVIN, *Defendants,*
DAVID HANDEL, *Defendant-Appellant.*

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman
Acting Chief Judge

July 28, 1972

APPENDIX D

Title 18, United States Code

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 26, United States Code

§ 7206. Fraud and False Statements

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries.—Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud.—Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements.—In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully—

(A) Concealment of property.—Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records.—Receives, withholds, destroys, mutilates, or

falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852.

Federal Rules of Criminal Procedure

Rule 52.
HARMLESS ERROR AND PLAIN ERROR

* * *

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Rules of the U. S. Courts

Second Circuit Rules Regarding Prompt Disposition of Criminal Cases

(promulgated January 5, 1971 as amended May 24, 1971)

The Circuit Council of the Second Circuit in the exercise of its supervisory power over the administration of justice in the federal courts of the circuit, and pursuant to its powers under 28 U.S. Code § 332, hereby promulgates the following rules for observance in the district courts of the circuit, commencing six months from the date of this announcement:

* * *

4. In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the gov-

ernment is not ready for trial within such time, or within the periods as extended by the district court for good cause under rule 5, and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed.

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8. A demand by a defendant is not necessary for the purpose of invoking the rights conferred by these rules. However, failure of a defendant to move for discharge prior to plea of guilty or trial shall constitute waiver of such rights. The preceding sentence shall not apply to a defendant without counsel unless he has notice of these rules.